IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI, Plaintiffs, v. STATE OF TEXAS; RICK PERRY, In His Official Capacity As Governor Of The State of Texas; DAVID DEWHURST, In His Official Capacity As Lieutenant Governor and Presiding Officer Of the Texas Senate, Defendants.	CIVIL ACTION NO. L-03-113

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Plaintiffs Gonzalo Barrientos, *et al.*, respectfully submit this Memorandum in Opposition to Defendants' Motion to Dismiss ("Defendants' Motion").

INTRODUCTION AND SUMMARY

In Count I of the complaint, plaintiffs allege two separate changes have been administered by the defendants without the necessary preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. First, plaintiffs allege that defendants have changed their redistricting practices and procedures by eliminating the supermajority (2/3) Rule that has been consistently applied in the Texas Senate to congressional redistricting legislation in the past, replacing it with a simple majority rule for passing

15

congressional redistricting legislation. Second, plaintiffs allege that the defendants have departed from their universal past practices by considering congressional redistricting legislation mid-decade when they have in place a legal map and are under no mandate or duty to remedy or replace the current plan.

In an action brought to enforce Section 5 of the Voting Rights Act, in which plaintiffs allege that a covered jurisdiction has instituted voting changes without the required preclearance, a three-judge district court does not have jurisdiction to determine "whether the changes at issue ... in fact resulted in impairment of the right to vote, or whether they were intended to have that effect." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985). Instead, the only questions for the court are: "(i) whether a change is covered by §5, (ii) if the change is covered, whether §5's approval requirements were satisfied, and (iii) if the requirements have not been satisfied, what relief is appropriate." *McCain v. Lybrand*, 465 U.S. at 250, n. 17; *Lopez v. Monterey County*, (1996) and *City of Lockhart v. United States*, 460 U.S. at 129, n. 3.

Section 5 requires that before a covered jurisdiction such as Texas "shall enact or seek to administer" any change in procedures or practices affecting voting, it must first obtain preclearance from the United States Attorney General or the United States District Court for the District of Columbia. 42 U.S.C. §1973c. If a covered jurisdiction has not obtained preclearance for changes in its voting practices or procedures, "§5 plaintiffs are entitled to an injunction prohibiting the State from implementing the changes." *Clark v. Roemer*, 500 U.S. at 653 (citing *Allen v. State Board of Elections*, 393 U.S. at 572); *Lopez v. Monterey County*, 519 U.S. 9 (1996); and *United States v. Louisiana*, 952 F. Supp. 1151 (W.D. La. 1997), *aff'd*, 521 U.S. 1101 (1997).

ARGUMENT

1. PLAINTIFFS' SECTION 5 CLAIMS ARE SUBSTANTIAL AND WARRANT THE CONVENING OF A THREE-JUDGE COURT

At the outset, the State of Texas claims that plaintiffs' Section 5 claims are wholly insubstantial and do not warrant the convening of a three-judge court. They urge this single judge court to dismiss plaintiffs' claims. Defendants fail to cite the relevant Fifth Circuit law that provides the legal standard in this area -- *LULAC of Texas v. State of Texas*, 113 F.3d 53 (5th Cir. 1997). In that case, LULAC filed the action to require that "new rules" in Texas's election laws announced by the Supreme Court of Texas in a recent decision were subject to the preclearance requirements of § 5 of the Voting Rights Act. The district court, without convening a three-judge court, granted Texas's motion to dismiss. The Fifth Circuit reversed and held:

> Generally, actions by private individuals seeking declaratory and injunctive relief against violations of §5 must be referred to a three-judge court for the determination of whether the political subdivision has adopted a change covered by §5 without first obtaining preclearance. *Allen v. State Board of Elections*, 393 U.S. 544, 554-63, 89 S.Ct. 817, 825- 31, 22 L.Ed.2d 1 (1969); *Trinidad v. Koebig*, 638 F.2d 846 (5th Cir.1981); *Sumter County Democratic Executive Comm. v. Dearman*, 514 F.2d 1168, 1170 (5th Cir.1975). However, where §5 claims are "wholly insubstantial" and completely without merit, such as where the claims are frivolous, essentially fictitious, or determined by prior case law, a single judge may dismiss the claims without convening a three-judge court. *See, e.g.*, *United States v. Saint Landry Parish Sch. Bd.*, 601 F.2d 859, 863 (5th Cir.1979); *Broussard v. Perez*, 572 F.2d 1113, 1118 (5th Cir.), *cert. denied*, 439 U.S. 1002, 99 S.Ct. 610, 58 L.Ed.2d 677 (1978); *Carr v. Edwards*, 1994 WL 419856 (E.D.La. Aug. 8, 1994).

LULAC, supra, at 55.

The plaintiffs' case here is not wholly insubstantial, frivolous, or fictitious. Nor does prior case law dictate that plaintiffs' §5 claims must fail. Rather, as we show below, the two voting changes at issue in Count I of plaintiffs' complaint fall well

within well-settled Section 5 principles. A three-judge court should be convened to hear and determine plaintiff's §5 claims.[1]

2. A CHANGE IN THE CONSISTENTLY APPLIED PRACTICE OR PROCEDURE OF IMPOSING A 2/3 RULE IN THE SENATE – APPLICABLE ONLY TO CONGRESSIONAL REDISTRICTING – REQUIRES PRECLEARANCE.

A. There Has Been A Supermajority (2/3) Rule in the Texas Senate For Congressional Redistricting Bills and Defendants Have Changed To A Simple Majority Requirement in 2003

The first Section 5 claim at issue here involves a change in the usual and customary practices of the Texas Senate *applicable only to redistricting legislation.* Most of the facts are either undisputed or indisputable. Texas has employed a 2/3 Rule for passing redistricting legislation. Both sides agree that Texas has a "tradition" of using a practice or procedure that forces a supermajority 2/3 vote on bills in the Senate if they are taken out of order. See Defendants' Motion at 4 (calling the use of a blocker bill a "tradition") and at 4, note 1 ("informal tradition").[2] The legislative device that has been used to impose this 2/3 rule is a "blocker bill" and the plaintiffs and defendants largely agree on the description of how a blocker bill operates to force a 2/3 vote.

Where plaintiffs and defendants disagree, however, is in the characterization of those practices and procedures. Plaintiffs call it a 2/3 Rule and defendants say it is a

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[1] Although defendants argue before this Court that Section 5 preclearance is not needed for the change from the supermajority (2/3) Rule to a simple majority in their congressional redistricting practices, defendants submitted that change to the United States Department of Justice (hereafter "DOJ") for preclearance on August 15, 2003. That submission does not necessarily moot plaintiffs' claims under Count I as to the 2/3 Rule. Only if DOJ grants or denies preclearance would the claim be moot. If DOJ determines that the repeal of the 2/3 Rule for redistricting legislation is not a change within the scope of Section 5, then plaintiffs' claim on the 2/3 Rule will not be moot. *See Hardy v. Wallace*, 603 F. Supp. 174, 177 (N.D. Ala. 1985); *cf. Reno v. Bossier Parish School Bd.*, 520 U.S. 471, 483 (1997) (while courts might owe deference to DOJ's duly promulgated regulations, DOJ determinations are not binding on the courts).

[2] The defendants concede that if a blocker bill is in place in the Senate, a two-thirds majority is required to take up any bill filed after the blocker bill. See Defendants' Motion at 4, n. 1.

legislative management tool for deciding the order of legislation that is taken up in the Senate. Both sides acknowledge that blocker bills have been used in the Texas Senate and when they are in place, a 2/3 vote is needed to take up any bill filed after the blocker bill. See defendants' motion at 3-4. Both sides also admit the supermajority (2/3) requirement was abandoned in the 2003 second special session.

The coverage issue under Section 5 is not a matter that depends on nomenclature or semantics, but rather is to be decided by looking to the actual practices or procedures that were in place and used by the State, and then to see if there has been a change. *Lopez v. Monterey County, supra.* In this case, the Section 5 question is straightforward: Are the State of Texas, or defendants Perry and Dewhurst, "seek[ing] to enact or administer"[3] "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" different from that in force or effect on the coverage date of the Voting Rights Act (*i.e.*, November 1, 1972)?

In the case before the Court, the Graham Declaration (Exhibit 15 to plaintiffs' motion for a preliminary injunction) details the history of congressional redistricting bills in the Texas Senate. It shows quite clearly that in the 1971 redistricting cycle, the practice or procedure of using a 2/3 Rule was in effect in the Texas Senate when congressional redistricting was considered. Defendants do not dispute this critical point in their papers. Thus, as of the coverage date in Texas, the defendants used a practice or procedure of requiring a supermajority (2/3) vote to pass a congressional redistricting

[3] Preclearance is required before actually *administering* a change, however, and use of the word "seek" in § 5 makes this distinction clear. *Lopez v. Monterey County*, 525 U.S. 266, 279 (1999).

bill.[4] The Graham Declaration also details how succeeding Legislatures used the same supermajority practices or procedures in passing congressional redistricting legislation. This pattern includes the session in 1991, the regular session this year, and the first special session this year. But there is no dispute that in the 2003 second special session, the 2/3 Rule is not in effect. See Defendants' Motion to Dismiss at 3, paragraph 6. Thus, there has been a change in this redistricting practice or procedure from what was in force or effect on the coverage date.

The only remaining question is whether this change falls within the ambit of Section 5 of the Voting Rights Act.

B. The Change In The 2/3 Rule Falls Within The Scope Of Section 5 Because It Is A Voting Practice Or Procedure

The defendants assert that the use of a blocker bill is not required under the Texas Constitution, Texas statutes, or Senate Rules. Defendants' Motion to Dismiss at 4. Apparently, it is defendants' contention that this exempts the 2/3 Rule from being a change in voting "standards, practices, or procedures" that must be precleared under Section 5. But the fact that the 2/3 Rule has not been formally enacted into Texas law is immaterial. The Supreme Court has held that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 170 (1985). Here, the 2/3 Rule has been a traditional practice of the Texas Senate and it has been consistently applied to congressional redistricting legislation for a century. Exhibit 15, Graham Declaration at paragraph 3.

[4] See Exhibit 15 (Graham Declaration) at 2, paragraph 4a ("Thus, as of 1971, the practice or procedure used by the Texas Senate in considering congressional redistricting employed extraordinary majority requirement before the full senate would consider such legislation.")

Thus, it matters not at all whether the 2/3 Rule is specifically referenced in the Texas Constitution or Texas statutes.[5]

Relying on the affidavit of Patsy Spaw, Secretary of the Texas Senate, defendants seek to create the impression that the 2/3 Rule is so frequently ignored that its abandonment now cannot constitute a change. That is just not true. Ms. Spaw states that:

> Historically, according to the *Senate Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of the regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, the First Called Session of the 63rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature.

Spaw Affidavit at 2.

But while Ms. Spaw is technically correct that a 'blocker bill' was not used on the cited occasions, her affidavit "gives the invalid impression that the Senate did not use a method requiring an extraordinary majority vote in order to consider bills during those sessions when, in fact, it did." Exhibit 23 (Brian Graham Declaration) at 7 Mr. Graham has reviewed "the official bill histories contained in the Senate Journals for the Special Sessions cited by Ms. Spaw" and his review "clearly demonstrates that, even without the use of a blocker bill, 53 of the 65 bills that the senate considered during those particular Special Sessions reached the Senate Floor as a result of a motion to suspend one or more

[5] Contrary to the defendants' claims, there is a 2/3 Rule in the Texas Senate. Rule 5.13 provides that "[n]o bill, joint resolution, or resolution affecting state policy may be considered out of its regular calendar order unless the regular order is suspended by a vote of two-thirds of the members present." See Attachment A to Defendants' Motion to Dismiss. As both the Spaw Affidavit and the Graham Declaration make clear, the use of a "blocker bill" activates this Rule, which has become known as "the 2/3 Rule" in the Texas Senate.

of the Senate's rules *where either unanimous consent or an extraordinary majority vote was required.*" Exhibit 23 (emphasis added). Mr. Graham's basic finding is that, far from being a normal practice, the use of any method to place a bill before the Senate other than by a motion to suspend the rules (which requires a supermajority vote) is a clear change from established Senate practice. *Ibid.*

The defendants cite several cases which they claim shows that the change occasioned by the abandonment of the supermajority (2/3) practice or procedure is not subject to Section 5. None of those decisions, however, justify a holding in this case that the changes at issue here are beyond the scope of Section 5.

First, defendants cite *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992), arguing that "in light of this on-point ruling, it is beyond serious dispute that the decision not to utilize a 'blocker bill' is not a covered change that falls under 5, and therefore does not require preclearance." Defendants' Motion at 9. But *Presley* is so utterly different as to be easily distinguishable. There, plaintiffs challenged two resolutions of a county commission. One resolution transferred road supervision authority from the county commissioners to the county engineer. The other resolution transferred authority over road repairs from individual commissioners to the entire county commission. These resolutions were challenged under section 5 on the theory that they diminished the authority of individual road commissioners and thus affected the nature of the office that voters could vote for. The Supreme Court rejected that argument, holding that such changes did not have to undergo Section 5 preclearance because they had no connection to voting. The Court said: "The change concerns only

the internal operations of an elected body and the distribution of power among officials, and, thus, has no direct relation to, or impact on, voting." *Presley, supra,* at 492.

This case bears no resemblance to *Presley*. The argument here is that the Senate made an exception to its usual practices in enacting legislation, that that change greatly altered the ability of a 1/3 minority to affect the course of events, *and that the change was made applicable only to congressional redistricting*. The intent and effect was to break a log-jam in the Texas Senate on that issue, allowing the majority to pass a new map that would never win bipartisan support. The abandonment of the supermajority (2/3) Rule thus directly impacts voters and the redistricting practices and procedures in Texas.[6]

Defendants also cite *DiJulio v. Georgia*, 290 F.3d 1291 (11th Cir. 2002)[7] in support of their argument that Section 5 does not reach internal legislative rules, such as the supermajority 2/3 Rule. Here again, however, *DiJulio* provides virtually no support for their argument. In *DiJulio*, plaintiffs argued that changes in the rules of the Georgia Legislature were subject to Section 5. But not only did the plaintiffs in *DiJulio* fail to attack legislative rules that impacted voting or elections, the court found that plaintiffs in that case, "*without identifying specific rule changes*, argue that the changes in Rules

[6] Relying on *Presley*, one three-judge court held that changing the manner in which appointed school board members were selected was not a change that had a direct relation to voting. The change in that case involved a shift in the manner of appointing non-elected officials, " a daily grist" of local governments that has nothing to do with voting or voters. That is in sharp contrast to this case where the supermajority (2/3) Rule that plaintiffs challenge relates to solely to congressional redistricting legislation.

[7] Defendants cite to *DiJulio* was actually to the court of appeals' decision that was subsequently withdrawn by the Eleventh Circuit Court of Appeals. The correct citation to the opinion that replaced the one cited by defendants is set forth in the text above.

of the General Assembly are subject to preclearance." *DiJulio, supra*, 290 F. 3rd at 1296.[8]

Moreover, the Department of Justice has routinely reviewed changes in redistricting procedures as part of its ongoing responsibility under the Voting Rights Act. See Exhibit 22 hereto (Sample Notices of Preclearance Activity published weekly online [http://www.usdoj.gov/crt/voting/notices/votarch.html] by the U.S. Department of Justice's website listing state and local governments that have submitted changes for preclearance review under Section 5 of the Voting Rights Act for selected periods). In just a few months of preclearance activity in 2000, for example, the Department of Justice reviewed redistricting procedures from several State and local governments. This listing of State and local governments routinely making submissions of changes in their redistricting practices and procedures under Section 5 suggests that the defendants have greatly exaggerated their claims about the intrusiveness that would occur if the change to the 2/3 Rule were subjected to preclearance. Indeed, these defendants were

[8] Even in *DiJulio*, the court of appeals did not foreclose Section 5 review of internal legislative rules. The court of appeals said that the preclearance requirements of the Voting Rights Act could "apply to legislative internal rule changes in only the most limited of circumstances[.]" *DiJulio, supra*, at 1296-97. And in *Bonilla v. City of Chicago*, 809 F. Supp. 590 (N.D. Ill. 1992),another case relief upon by the defendants, a district court rejected plaintiffs' Section 2 challenge to a city requirement that at least ten (of 50) aldermen support a proposed redistricting ordinance before it can be submitted for voter approval. In *Bonilla*, plaintiffs attacked a rule that required that a redistricting map to receive the support of 20% of the city council before it could be considered in a referendum. In the case at bar, plaintiffs are not challenging the 2/3 rule, they are seeking to use its protections. Thus, the concerns expressed by the court in *Barnett* that the plaintiffs there, by challenging the 10 alderman rule were challenging majority rule, are not applicable here. The *Barnett* court said: "requiring a majority of legislators to approve a particular redistricting plan is clearly permissible under the Voting Rights Act." Id. at 596. In the case at bar, plaintiffs do not challenge the right of a supermajority (2/3) of the senate to enact a bill or majority rule; rather plaintiffs seek to maintain the supermajority requirement.

able to make a submission of the 2/3 Rule to the Department of Justice within a few days of the filing of this lawsuit. See Submission of Plaintiffs, August 20, 2003.

The Department of Justice has taken the position that changes to redistricting procedures must be precleared and has found that such changes can be discriminatory in violation of Section 5 of the Voting Rights Act. In 1998, for example, the Department of Justice interposed an objection to the State of Louisiana's decision to change the time period in which the State's voting precincts could not be changed. See Exhibit 21 (DOJ Letter of Objection of January 13, 1998). Louisiana had enacted a law that would have extended the time period in which local officials would not be permitted to change voting precinct boundaries around the time of the 2000 census. The Department of Justice objected, stating that proposed voting precinct freeze "will have a significant impact on the redistricting choices of state and local officials...." See Exhibit 21. The objection letter further concluded that "the proposed changes may well hamper the ability of state and local officials to draw districts that do not fragment, pack, or submerge minority voters and, in the context of racially polarized voting, may well leave minority voters worse off in terms of their electoral opportunity under post-2000 redistricting plans." Exhibit 21 at 3.

In the present case, defendants have made a change in the redistricting process by abandoning the supermajority (2/3) Rule solely for congressional redistricting legislation and that decision most assuredly "will have a significant impact on the redistricting choices of state officials." Furthermore, as shown by the sworn Declarations of the 11 plaintiffs-senators who have brought this action, see Exhibits 1-11 to plaintiffs' motion for preliminary injunction, the change from a supermajority to a

simple majority has the "potential for discrimination" against minority voters and their elected representatives. See *Morse v. Republican Party of Virginia*, cite. These 11 plaintiffs represent the only minority opportunity districts in the Texas Senate; seven are Hispanic, two are African-American, the remaining two Anglo Senators represent majority-minority districts. Ten of the 11 districts are majority-minority and the eleventh is around 45% minority in total population.

Changes to redistricting practices and procedures occasioned by the change in the supermajority (2/3) practice to a simple majority directly affect voters, their ability to shape the contours of any new map, and their ability to participate effectively in the political process. Redistricting is a process by which state officials alter voting constituencies and impact the voters' ability to elect candidates of their choice to office. The redistricting process involves voting because it inevitably will affect the ability of voters to cast ballots, as well as the opportunity for them and their elected representative to express their views on the configuration of the districts. Where a redistricting practice or procedure has been in place for many years, changes to it directly impact voters' abilities to affect the congressional districts in any redistricting plan that is being considered or which may eventually pass the Senate. And a procedural protection like the 2/3 Rule is vitally important to maintaining the integrity of the redistricting process and insuring that minorities can play an effective role in the political process.

In addition, changes in redistricting procedures thus affect voters' abilities to effectuate changes in voting constituencies, which in turn can affect the ability of candidates to become or remain holders of elective office. *See Dougherty County Board of Education v. White*, 439 U.S. 32 (1978) (requiring preclearance of change in

absenteeism policy that forced employees to take unpaid leave if they ran for office). *See also* 28 C.F.R. §51.13(g) (Regulations of the United States Department of Justice Under Section 5 of the Voting Rights Act listing the ability to become or remain holders of elective office as examples of covered changes). Because sponsors of redistricting legislation in the Texas House and Senate in 2003 have made clear that the aim of their redistricting legislation is to replace Democratic officeholders with Republicans (See, *e.g.*, Exhibit 16 to plaintiffs' motion for preliminary injunction), changes in redistricting procedures will have a profound effect on the ability of candidates "to become or remain holders of elective office" and will thus affect voters' choices.

As we stated in our motion for a preliminary injunction, the State of Texas has made the policy decision to create a redistricting "practice or procedure" by which new political lines will be formed, and this "practice or procedure" goes back at least several decades. See Exhibit 17 (State's Submission Letters to the Department of Justice in 1981 and 1991, providing details about redistricting process and public input). State officials charged with the responsibility to do redistricting have claimed to members of the public that their input will matter and will held shape the map. Where, as here, the State has made the redistricting process a determining factor in how the lines will be drawn and where the voters will be placed or reformed into new voting constituencies, it follows that changes to that process will directly affect voting rights.

In Texas, redistricting is not just a simple one-time act that takes place when a bill is passed in the Legislature. Rather, the State has made the decision that it will involve a process that shapes the bill and determines how the lines will ultimately be drawn. Changes to that redistricting process, such as whether minorities and their elected

representatives in the Texas Senate can force compromise or consensus on a redistricting bill—as the supermajority rule is intended to do—are a potent procedural weapon for racial and ethnic minority voters and their elected senators. That the redistricting plan itself will ultimately be subject to Section 5 preclearance is some protection, to be sure. But a plan may be unobjectionable under the Voting Rights Act and nonetheless impact voters in ways they would like to avoid or change, such as dividing their communities of interest or placing their community in a different congressional district. The process of redistricting allows them to pursue such changes.

Section 5 of the Voting Rights Act extends protections to minority voters to be effective in all aspects of the political process, not just in the final bill that is enacted As the Supreme Court in *Morse v. Republican Party of Virginia*, cite, "we have consistently construed the [Voting Rights] Act to require preclearance of *any change in procedures or practices that may bear on the 'effectiveness' of a vote* cast in 'any primary, special or general election.'" (Emphasis added). Most recently, in *Georgia v Ashcroft*, the Supreme Court once again observed that, under Section 5 of the Voting Rights Act, the ability of minority voters to play an *effective* role in the political process is at the heart of Section 5. "Section 5 gives States the flexibility to choose one theory of effective representation over the other." *Georgia v. Ashcroft*, 123 S. Ct. 2498, 2512 (U.S., June 26, 2003).

3. THE EXERCISE OF DISCRETION TO ENACT A CONGRESSIONAL REDISTRICTING PLAN IN MID-DECADE IS A CHANGE WITHIN THE MEANING OF SECTION 5 OF THE VOTING RIGHTS ACT

With regard to the question of whether the exercise of discretion to enact a new congressional map in mid-decade is a change that must be precleared under section 5,

defendants make no serious effort to challenge plaintiffs' contentions. Instead, in a footnote, they simply assert that such a change is not cognizable under Section 5 because the Voting Rights Act considers only those voting changes that are "actually enacted, and does not address legislative decisions about which legislation to consider and when." Defendants motion at 10, note 2.

As noted above, Section 5 of the Voting Rights Act on its face is not limited to enactments. It says that changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" must receive preclearance approval under Section 5. See 42 U.S.C. 1973c. Indeed, the Supreme Court has specifically held that "the form of a change in voting procedures cannot determine whether it is within the scope of § 5." *NAACP v. Hampton County Election Comm'n,* 470 U.S. 166, 170, 105 S.Ct. 1128, 1135, 84 L.Ed.2d 124 (1985) (rejecting the argument that a change in voting practices or procedures was not subject to § 5 because it was an informal administrative effort designed to comply with a precleared state statute).[9]

Indeed, a three-judge court here in Texas just five years ago found that changes occasioned by decisions of the Texas Supreme Court are subject to Section 5's

[9] Similarly, in *Allen v. State Board of Elections*, the States of Mississippi and Virginia had "passed new laws or issued new regulations." The Supreme Court observed that "the central issue is whether these provisions fall within the prohibition of Section 5 that prevents the enforcement of 'any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting' unless the State first complies with one of the section's approval procedures. *Allen* involved voting changes occasioned by the Virginia Board of Elections when it issued "a bulletin to all election judges, instructing that the election judge could aid any qualified voter in the preparation of his ballot, if the voter so requests and if the voter is unable to mark his ballot due to illiteracy." *Allen, supra*, at 553. The Supreme Court rejected a narrow reading as to the scope of Section 5 coverage: "The Voting Rights Act was aimed at the subtle, as well as the obvious, state regulations which have the effect of denying citizens their right to vote because of their race. Moreover, compatible with the decisions of this Court, the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective." *Allen, supra*, at 565-66.

preclearance requirements. *LULAC of Texas v. State of Texas*, 995 F. Supp. 719, 725 (W.D.TX 1998)(three-judge court). In *LULAC*, the issue was whether changes in the method of filling judicial vacancies occasioned by a decision of the Texas Supreme Court were subject to the preclearance requirements of Section 5. The three-judge court held that the changes were required to undergo Section 5 preclearance, rejecting an argument similar to the one advanced by the State of Texas here that the Supreme Court's decision should be exempt from Section 5 because it did not constitute a formal enactment:

> Thus, the Texas Supreme Court accomplished by judicial decision the same result that would have occurred had the legislature amended the statute in the same fashion. We see no reason why such a change, which if enacted by the legislature would require § 5 preclearance, should not also require preclearance if it resulted from a state court opinion.

LULAC of Texas v. State of Texas, 995 F. Supp. 719, 725 (W.D.TX 1998)(three-judge court).[10]

The exercise of discretion as to when the state enacts redistricting legislation is itself a change in the redistricting process that affects voters and thus is subject to Section 5. *Cf. Foreman v. Dallas County, Texas*, 521 U.S. 979 (1997)(exercising discretion as to the appointment of election judges held subject to Section 5 preclearance requirements). What is changing here are the circumstances and the

[10] In *LULAC of Texas, supra*, the three-judge court found "that, before the State can enforce the election law resulting from the Supreme Court's decision in Hardberger, it must receive preclearance from either the United States Attorney General or the United States District Court for the District of Columbia...[N]othing in this opinion precludes the Texas Supreme Court from performing its state constitutional duty of determining what the state law is. When, however, that interpretation of state law results in a change in voting practices covered by § 5 of the VRA, the State may not enforce the resulting law without first complying with the preclearance requirements of § 5." *LULAC, supra*, at 726

timing of congressional redistricting. Never before in its history has Texas ever attempted to replace a valid and legal map with a new one.

Changes as to the timing of redistricting and other changes to the redistricting process or practices can directly impact the ability of voters to participate effectively in all aspects of the political process. That is especially true where, as in Texas, the State has made it clear that the public's involvement in the process will determine the location of the new voting boundaries. Thus, changes to the process will directly affect voters and their rights to cast ballots under the redistricting plan that will eventually be enacted. The redistricting process leads to new lines that inevitably will affect the effectiveness of voters' ballots. When the State changes its redistricting procedures and exercises its discretion to perform congressional redistricting, it affects the voters' ability to impact the plan that ultimately is adopted and their ability to elect candidates of choice under it.

4. PLAINTIFFS' LAWSUIT DOES NOT SEEK FEDERAL INTRUSION INTO THE DAY-TO-DAY AFFAIRS OF THE TEXAS LEGISLATURE.

It is absurd to suggest that plaintiffs' theory must be wrong because it would be intrusive for the legislature to have to preclear changes in its procedures targeted as voting. Under the defendants view, any changes in redistricting procedures that are instituted within the legislature are beyond the scope of Section 5. Thus, if the Texas Senate adopted a Rule that all voting or election-related legislation had to pass by unanimous vote, such a change would not be subject to Section 5 preclearance review because it is an internal legislative rule. Similarly, to use an extreme example, if the Texas Senate adopted a Rule that said only Anglos in the Senate could vote on redistricting legislation, that too would not be within the scope of Section 5. According

to the defendants, these changes would be beyond the scope of Section 5 because they involve "internal legislative matters." Defendants' Motion at 14. Such an interpretation runs directly contrary to the broad interpretation of Section 5 that was envisioned by Congress and has been consistently applied by the United States Supreme Court. *See Allen, supra,* and *Morse v. Republican Party of Virginia, supra.*

The defendants cite examples of things that happen in a legislature every day that they claim would be subject to Section 5 if plaintiffs prevail on their Section 5 claims here (e.g., appointment of committee chairs, which senators are recognized on the floor, which committee will get a bill, etc.). See Defendants' Motion at p. 10. But the comparisons are inapt.

Far from making a broad attack on Senate internal operating rules, we are making a quite narrow attack on the abolition of one rule in a specific situation involving voting. It is undisputed that allowing such an exception, only in this one context, will have the intended consequence of allowing passage of a redistricting bill changing electoral districts. It would be remarkable if a court were to decide that such an exception to the Senate's usual operating processes, designed for the sole purpose of minimizing the legislative power of the representatives of minority interests and ultimately changing district lines, is outside the scope of section 5.

Requiring the State of Texas's to preclear that kind of change would not subject all internal rule changes to preclearance requirements any more than the decision in *LULAC v. State of Texas, supra,* --requiring preclearance of voting changes occasioned by the Texas Supreme Court's decision interpreting an election or voting-related law— subjected other decisions by the state's highest court to preclearance requirements. As

the three-judge court made clear in *LULAC*, "Nothing precludes the Texas Supreme Court from performing its state constitutional duty of determining what the state law is. When, however, that interpretation of state law results in a change in voting practices covered by § 5 of the Voting Rights Act, the State may not enforce the resulting law without first complying with the preclearance requirements of §5." *LULAC, supra*, at 726.

5. DEFENDANTS' FEDERALISM ARGUMENTS ARE MISPLACED.

The State devotes several pages of its motion (pp. 12-14) to raising federalism concerns about the intrusiveness of Section 5 into the state's election machinery. Such claims are nothing new. To make its point, the State engages in substantial hyperbole, claiming that a decision holding the 2/3 Rule subject to the Section 5 preclearance requirements will open up even the most mundane legislative matters to federal scrutiny under the Voting Rights Act.

In the context of this case, the defendants' claims ring hollow. They amount to little more than generalized criticism about the intrusiveness of the Voting Rights Act into the affairs of the State. The Supreme Court has consistently rejected such arguments, however, when they are considered in light of the laudable purposes of the Voting Rights Act: to rid the nation of racial discrimination in voting. *See, e.g., City of Rome v. United States*, 446 U.S. 156 (1980).

Congress has addressed federalism concerns raised by the Voting Rights Act by providing that a three-judge court should be convened to hear and determine cases such as this one. As the Supreme Court explained in *Allen v. State Board of Elections*, 390 U.S. at 562:

> Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration. The Voting Rights Act of 1965 is an example. Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system. The problems are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure.

6. PLAINTIFFS HAVE STANDING.

Defendants claim that the plaintiffs lack standing because they are Senators and that this action must be brought by voters. Defendants' Motion at 16 and at 10, note 3. But the plaintiffs here are voters as well as Senators. They have brought this case in their individual capacities as voters and in their official capacities as Senators. Plaintiffs clearly have standing to bring this suit. See *Allen v. State Board of Elections, supra.*

III. Conclusion

For the reasons set forth above, defendants' motion to dismiss should be denied.

Respectfully submitted,

Renea Hicks by & w/ permission

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Certificate of Service

I hereby certify that on this 25th day of August, I served a copy of the foregoing on the following counsel, by facsimile, and by placing a copy of the same in the United States mail, postage prepaid, to:

Edward D. Burbach
Deputy Attorney General for Litigation
Office of the Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548
fax: (512) 474-2697.

_____
Carlos M. Zaffirini, Sr.

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20035

January 13, 1998

Angie Rogers LaPlace, Esq.
Assistant Attorney General
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005

Dear Ms. LaPlace:

This refers to Section 2 of Act No. 1420 (1997), which changes the time period during which voting precinct boundaries cannot be changed; requires voting precinct boundaries to follow Census tabulation boundaries as of July 1, 1997; changes the effective dates for new precincts; specifies the voting precincts that will be used for reapportionment purposes; clarifies which voting districts are to be considered when consolidating precincts, and permits consolidation of voting precincts from different voting districts through June 30, 1998, for the State of Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. We received your responses to our September 29, 1997, request for additional information on September 30 and November 14, 1997.

With the exception of provisions concerning the time period during which voting precinct boundaries cannot be changed, the Attorney General does not interpose any objection to the specified changes. However, we note that Section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of the changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

We cannot reach the same conclusion regarding the provisions of Act No. 1420 (1997) that concern the period during which voting precinct boundaries cannot be changed. To reach this conclusion, we have considered carefully the information you have provided in this submission, and the information in our files concerning the redistricting submissions of many of the parish governing authorities and school districts within the state following the 1990 Census, as well as Census data and information and comments from other interested persons.

Under state law, parish governing authorities are authorized to change voting precinct boundaries, but are generally required to do so in a manner that avoids splitting a voting precinct between two or more voting districts. In the past, the state, in preparation for the decennial census, has limited the ability of parish officials to change voting precinct boundaries in anticipation of the tabulation and release of new Census data. Under existing law, parish officials would not be permitted to alter voting precinct boundaries from January 1, 1999, through December 31, 2000, unless ordered to do so by a court or as a result of changes in municipal boundaries. It is anticipated that Census data will be made available to the state from the U.S. Bureau of the Census by April 1, 2001. Under the proposed changes, the period during which parish officials would be prohibited from changing precinct boundaries would be extended to December 31, 2003, except that voting precincts that include fewer than 300 voters may be consolidated after January 1, 2002, so long as consolidated precincts do not cross voting district lines as those districts are reapportioned. The proposed changes are a sharp departure from prior law and practice in that they continue the freeze for a longer period of time and without exceptions or a window of opportunity similar to those present in prior decades.

State officials indicate that they fully expect that subjurisdictions within the state will have completed the redistricting process and will have adopted new plans by December 31, 2003, in anticipation of state and local elections scheduled in that year. Thus, the five-year prohibition on precinct changes would freeze the boundaries of voting precincts during the critical period when state and local officials are engaged in redistricting. The proposed freeze, in combination with the state's requirement that voting precincts include no more than one voting district, will have a significant impact on the redistricting choices of state and local officials and, in effect, will require that newly drawn districts include whole voting precincts, regardless of the impact on minority voters.

Under existing law, parish election officials may generally use their discretion in determining the composition of voters included within a voting precinct primarily because voting precincts, in large part, serve only to define which voters will vote together in the same location on election day. This administrative function, albeit important, differs significantly from the function of voting district boundaries. If local officials are permitted to alter voting precinct lines in the redistricting context, they can continue to achieve the election administration function that precincts serve without hampering

redistricting choices. If, however, officials are not permitted to alter precinct boundaries and, where voting precincts do not fairly reflect minority voting strength, it will be virtually impossible to draw voting districts that fully reflect minority voting strength.

Unlike legislation adopted during the 1990 redistricting period in response to concerns by local officials about the freeze on precinct changes imposed at that time[1], Act No. 1420 (1997) does not include any opportunity for precinct changes during the time when redistricting is expected to occur. Nor does the Act authorize local officials to change precinct boundaries if necessary to satisfy the requirements of Section 5 of the Voting Rights Act. An early version of Act No. 1420 included an exception to the general prohibition on changing precincts and provided a window of opportunity for parish officials to change precinct lines once Census data were released and redistricting began. State officials indicate that the state did not include this window of opportunity and exception to the freeze provision in the final version of the bill adopted as Act No. 1420 because the state had not consulted with local officials before adopting the proposed freeze, and because sufficient time remains in advance of the 2000 Census to address these concerns. We, however, must evaluate the potential effect of voting changes the state has in fact enacted and submitted for Section 5 review -- not what the state may enact at some future point in time.

Our review of post-1990 Census redistricting submissions for parish governing authorities and school districts in the state suggests that if parish officials lack the authority to make changes in voting precinct lines during the entire period when most redistricting will occur, local officials may be forced to adopt plans that do not fairly recognize minority voting strength. Thus, the proposed changes may well hamper the ability of state and local officials to draw districts that do not fragment, pack or submerge minority voters, and, in the context of racially polarized voting, may well leave minority voters worse off in terms of their electoral opportunity under post-2000 redistricting plans. Voting changes that will "lead to a retrogression in the position of . . . minorities with respect to their effective exercise of the electoral franchise," violate Section 5. See Beer v. United States, 425 U.S. 130, 141 (1976).

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[1] These acts were precleared by the Department of Justice: Act 288 (1990), precleared on November 1, 1990; Act 925 (1992), precleared on December 1, 1992; and Act 286 (1993), precleared on November 16, 1993.

While we are not unmindful of the state's interest in ensuring the orderly administration of elections, that interest must be bounded in some reasonable way so as not to impinge too heavily on the important federal interest the state and its political subdivisions have in complying with the requirements of federal law. Under the proposed freeze provisions, local officials will be hamstrung in their efforts to comply with the Voting Rights Act because the state has not taken any steps to ensure that they will have an opportunity to adjust voting precinct boundaries in the context of redistricting in order to avoid the impact on minority voting strength that rigid adherence to the "whole precinct" redistricting requirement is likely to produce.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor a discriminatory effect. Georgia v. United States, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In light of the considerations discussed above, I cannot conclude that your burden has been sustained in this instance. Therefore, on behalf of the Attorney General, I must object to the proposed provisions of Act No. 1420 (1997) that concern the time period during which voting precinct boundaries cannot be changed.

We note that under Section 5 you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the proposed changes have neither the purpose nor will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. See 28 C.F.R. 51.44. In addition, you may request that the Attorney General reconsider the objection. See 28 C.F.R. 51.45. However, until the objection is withdrawn or a judgment from the District of Columbia Court is obtained, the provisions of Act No. 1420 (1997) that concern the time period during which voting precinct boundaries cannot be changed continue to be legally unenforceable. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10.

Finally, we note that the provisions of Act No. 1420 (1997) precleared in this letter include provisions that are enabling in nature. Therefore, local jurisdictions are not relieved of their responsibility to seek Section 5 preclearance of any changes affecting voting that are adopted pursuant to this legislation (e.g., changes in voting precinct boundaries, including the creation, elimination and consolidation of precincts). See 28 C.F.R. 51.15.

Notice of preclearance activity under the Voting Rights Act of 1965, as amended

Notice Date: 09/08/2000

This periodic notice of preclearance submissions and actions is issued pursuant to the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act (Part 51 of Title 28 of the Code of Federal Regulations). The Attorney General has 60 days from the date of receipt to respond to each submission of voting changes. We invite persons interested in pending submissions to submit comments and information, in writing or by telephone, to the Voting Section of the Civil Rights Division at the earliest possible date to assure that they may be considered during the preclearance review time period. Telephone 1-800-253-3931 or (202) 307-2385 or write to Voting Section, Civil Rights Division, P.O.Box 66128, Washington D.C. 20035-6128 (the envelope and first page should be marked "Comment under Section 5").

Notices of preclearance can also be accessed on the Internet directly at www.usdoj.gov/crt/voting/sec_5/notices.htm or from the Department of Justice Home Page at www.usdoj.gov. Click on Organizations and Information from the Menu on the Department of Justice Home Page, then select the Civil Rights Division Home Page from the alphabetical list. Notices are listed under "Special Issues" on the Civil Rights Division Home Page.

The following submissions of Voting changes, submissions of items of additional information, notices of withdrawal of a submitted voting change, and requests for the Attorney General to reconsider an objection were received on the dates indicated.

08/29/2000 - 2000-3525

State: GEORGIA
County: MORGAN
Subjurisdiction:
Special election procedures (Tax)
Submission received

08/31/2000 - 2000-3537

State: TEXAS
County: VAN ZANDT
Subjurisdiction: CANTON
Special election procedures (Bond election)
Submission received

Absentee Voting (Additional location)
Absentee Voting (Location changed)
Submission received

09/01/2000 - 2000-3548

State: TEXAS
County: FORT BEND
Subjurisdiction: FORT BEND COUNTY MUNICIPAL UTILITY DISTRICT #41
Polling place (Changed)
Absentee Voting (Location changed)
Special election procedures
Special election procedures (Bond election)
Submission received
Expedited Consideration Requested

09/01/2000 - 2000-3550

State: FLORIDA
County: HILLSBOROUGH
Subjurisdiction: TAMPA
Precinct
Election administration (Poll workers)
Special election procedures (Charter amendment)
Redistricting procedures
Submission received

09/01/2000 - 2000-3551

State: VIRGINIA
County: HALIFAX
Subjurisdiction:
Absentee Voting (Location changed)
Submission received
Expedited Consideration Requested

09/01/2000 - 2000-3578

State: FLORIDA
Subjurisdiction:
Absentee Voting (Procedures)
Ballot format
Election administration (Election day activities)
Election administration (Poll workers)
Initiative, referendum, recall procedures
Submission received

Notice of preclearance activity under the Voting Rights Act of 1965, as amended

Notice Date: 09/15/2000

This periodic notice of preclearance submissions and actions is issued pursuant to the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act (Part 51 of Title 28 of the Code of Federal Regulations). The Attorney General has 60 days from the date of receipt to respond to each submission of voting changes. We invite persons interested in pending submissions to submit comments and information, in writing or by telephone, to the Voting Section of the Civil Rights Division at the earliest possible date to assure that they may be considered during the preclearance review time period. Telephone 1-800-253-3931 or (202) 307-2385 or write to Voting Section, Civil Rights Division, P.O.Box 66128, Washington D.C. 20035-6128 (the envelope and first page should be marked "Comment under Section 5").

Notices of preclearance can also be accessed on the Internet directly at www.usdoj.gov/crt/voting/sec_5/notices.htm or from the Department of Justice Home Page at www.usdoj.gov. Click on Organizations and Information from the Menu on the Department of Justice Home Page, then select the Civil Rights Division Home Page from the alphabetical list. Notices are listed under "Special Issues" on the Civil Rights Division Home Page.

The following submissions of Voting changes, submissions of items of additional information, notices of withdrawal of a submitted voting change, and requests for the Attorney General to reconsider an objection were received on the dates indicated.

09/05/2000 - 2000-3651

State: GEORGIA
County: JEFF DAVIS
Subjurisdiction:
Special election procedures (Tax)
Submission received

09/06/2000 - 2000-3584

State: GEORGIA
County: HART
Subjurisdiction:
Special election procedures (Tax)
Additional information received
Expedited Consideration Requested

Election administration (Poll workers)
Special election procedures (Charter amendment)
Redistricting procedures
Additional information received

09/15/2000 - 2000-3696

State: TEXAS
County: CAMERON
Subjurisdiction:
Absentee Voting (Additional location)
Absentee Voting (Location deleted)
Submission received
Expedited Consideration Requested

09/15/2000 - 2000-3698

State: GEORGIA
County: DOUGLAS
Subjurisdiction:
Special election procedures (Tax)
Submission received

Joseph D. Rich
Acting Chief, Voting Section

Notice of preclearance activity under the Voting Rights Act of 1965, as amended

Notice Date: 09/22/2000

This periodic notice of preclearance submissions and actions is issued pursuant to the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act (Part 51 of Title 28 of the Code of Federal Regulations). The Attorney General has 60 days from the date of receipt to respond to each submission of voting changes. We invite persons interested in pending submissions to submit comments and information, in writing or by telephone, to the Voting Section of the Civil Rights Division at the earliest possible date to assure that they may be considered during the preclearance review time period. Telephone 1-800-253-3931 or (202) 307-2385 or write to Voting Section, Civil Rights Division, P.O.Box 66128, Washington D.C. 20035-6128 (the envelope and first page should be marked "Comment under Section 5").

Notices of preclearance can also be accessed on the Internet directly at www.usdoj.gov/crt/voting/sec_5/notices.htm or from the Department of Justice Home Page at www.usdoj.gov. Click on Organizations and Information from the Menu on the Department of Justice Home Page, then select the Civil Rights Division Home Page from the alphabetical list. Notices are listed under "Special Issues" on the Civil Rights Division Home Page.

The following submissions of Voting changes, submissions of items of additional information, notices of withdrawal of a submitted voting change, and requests for the Attorney General to reconsider an objection were received on the dates indicated.

09/12/2000 - 2000-3663

State: GEORGIA
County: BUTTS
Subjurisdiction: JACKSON
Special election procedures (Referendum)
Additional information received

09/13/2000 - 2000-3649

State: LOUISIANA
Parish: EAST BATON ROUGE
Subjurisdiction: CENTRAL FIRE PROTECTION DISTRICT #4
Special election procedures
Notice of withdrawal

09/19/2000 - 1999-3048

State: LOUISIANA
Parish: EAST BATON ROUGE
Subjurisdiction: ZACHARY SCHOOL DISTRICT
Incorporation
Method of election (Single-member districts)
Concurrent terms
Term of office (Four years)
Number of officials
Implementation schedule (Interim board)
Candidate qualifications to serve in office
Special election procedures
General election (Date set)
Redistricting procedures
Additional information received

09/19/2000 - 2000-2142

State: ALABAMA
County: SHELBY
Subjurisdiction: MONTEVALLO
Designation of annexed area to election district
Related submission received

09/19/2000 - 2000-2964

State: NORTH CAROLINA
County: HOKE
Subjurisdiction: RAEFORD
Annexation
Submission received

09/19/2000 - 2000-3119

State: GEORGIA
Subjurisdiction:
Campaign financing provisions
Additional information received
Expedited Consideration Requested

09/19/2000 - 2000-3190

State: MISSISSIPPI
County: MONROE
Subjurisdiction:
Polling place (Changed)

Notice of preclearance activity under the Voting Rights Act of 1965, as amended

Notice Date: 09/29/2000

This periodic notice of preclearance submissions and actions is issued pursuant to the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act (Part 51 of Title 28 of the Code of Federal Regulations). The Attorney General has 60 days from the date of receipt to respond to each submission of voting changes. We invite persons interested in pending submissions to submit comments and information, in writing or by telephone, to the Voting Section of the Civil Rights Division at the earliest possible date to assure that they may be considered during the preclearance review time period. Telephone 1-800-253-3931 or (202) 307-2385 or write to Voting Section, Civil Rights Division, P.O.Box 66128, Washington D.C. 20035-6128 (the envelope and first page should be marked "Comment under Section 5").

Notices of preclearance can also be accessed on the Internet directly at www.usdoj.gov/crt/voting/sec_5/notices.htm or from the Department of Justice Home Page at www.usdoj.gov. Click on Organizations and Information from the Menu on the Department of Justice Home Page, then select the Civil Rights Division Home Page from the alphabetical list. Notices are listed under "Special Issues" on the Civil Rights Division Home Page.

The following submissions of Voting changes, submissions of items of additional information, notices of withdrawal of a submitted voting change, and requests for the Attorney General to reconsider an objection were received on the dates indicated.

09/06/2000 - 2000-3047

State: ALABAMA
County: BIBB
Subjurisdiction: NORTH BIBB
Numbered positions adopted
Annexation
Election administration
Candidate qualification procedures (Fees)
Related submission received

09/06/2000 - 2000-3235

State: TEXAS
County: HIDALGO
Subjurisdiction:
Precinct (Consolidation)

09/22/2000 - 2000-3155

State: ALASKA
Subjurisdiction:
Voter registration
Absentee Voting
Ballot format
Election administration
Voting qualifications/eligibility
Candidate qualification procedures
Candidate qualifications to serve in office
Redistricting procedures
Initiative, referendum, recall procedures
Additional information received
Expedited Consideration Requested

09/22/2000 - 2000-3393

State: ARIZONA
County: MARICOPA
Subjurisdiction: CHANDLER
Annexation
Related submission received

09/22/2000 - 2000-3453

State: TEXAS
County: LEON
Subjurisdiction: SOUTHEAST LEON COUNTY EMERGENCY SERVICES DISTRICT #1
Special election procedures (Referendum)
Additional information received

09/22/2000 - 2000-3479

State: ALABAMA
County: LIMESTONE, MADISON
Subjurisdiction: MADISON
Annexation
Related submission received

09/22/2000 - 2000-3563

State: TEXAS
County: FORT BEND, HARRIS, MONTGOMERY
Subjurisdiction: HARRIS COUNTY-HOUSTON SPORTS AUTHORITY
Special election procedures (Tax)

Notice of preclearance activity under the Voting Rights Act of 1965, as amended

Notice Date: 12/15/2000

This periodic notice of preclearance submissions and actions is issued pursuant to the Attorney General's Procedures for the Administration of Section 5 of the Voting Rights Act (Part 51 of Title 28 of the Code of Federal Regulations). The Attorney General has 60 days from the date of receipt to respond to each submission of voting changes. We invite persons interested in pending submissions to submit comments and information, in writing or by telephone, to the Voting Section of the Civil Rights Division at the earliest possible date to assure that they may be considered during the preclearance review time period. Telephone 1-800-253-3931 or (202) 307-2385 or write to Voting Section, Civil Rights Division, P.O.Box 66128, Washington D.C. 20035-6128 (the envelope and first page should be marked "Comment under Section 5").

Notices of preclearance can also be accessed on the Internet directly at www.usdoj.gov/crt/voting/sec_5/notices.htm or from the Department of Justice Home Page at www.usdoj.gov. Click on Organizations and Information from the Menu on the Department of Justice Home Page, then select the Civil Rights Division Home Page from the alphabetical list. Notices are listed under "Special Issues" on the Civil Rights Division Home Page.

The following submissions of Voting changes, submissions of items of additional information, notices of withdrawal of a submitted voting change, and requests for the Attorney General to reconsider an objection were received on the dates indicated.

12/08/2000 - 2000-4032

State: TEXAS
County: HAMILTON
Subjurisdiction: HICO
Annexation
Additional information received

12/08/2000 - 2000-4428

State: ALASKA
Subjurisdiction: UNALASKA
Special election procedures (Vacancy)
Submission received

12/08/2000 - 2000-4429

State: LOUISIANA
Parish: LA SALLE
Subjurisdiction: URANIA
Annexation
Submission received

12/08/2000 - 2000-4430

State: ARIZONA
County: PIMA
Subjurisdiction: GREEN VALLEY FIRE DISTRICT
Annexation
Submission received

12/08/2000 - 2000-4431

State: LOUISIANA
Parish: LIVINGSTON
Subjurisdiction: WALKER
Annexation
Submission received

12/08/2000 - 2000-4432

State: TEXAS
County: LIMESTONE
Subjurisdiction:
Special election procedures (Referendum)
Submission received

12/08/2000 - 2000-4433

State: GEORGIA
County: BUTTS
Subjurisdiction: BUTTS COUNTY SCHOOL DISTRICT
Special election procedures (Bond election)
Submission received
Expedited Consideration Requested

12/08/2000 - 2000-4441

State: ARIZONA
Subjurisdiction:
Redistricting procedures
Submission received
Expedited Consideration Requested

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS LAREDO DIVISION

GONZALO BARRIENTOS, RODNEY ELLIS, MARIO GALLEGOS, JR., JUAN "CHUY" HINOJOSA, EDDIE LUCIO, JR., FRANK L. MADLA, ELIOT SHAPLEIGH, LETICIA VAN DE PUTTE, ROYCE WEST, JOHN WHITMIRE, and JUDITH ZAFFIRINI,	)	
Plaintiffs,	)	
v.	)	
STATE OF TEXAS; RICK PERRY, In His Official Capacity As Governor Of The State of Texas; DAVID DEWHURST, In His Official Capacity As Lieutenant Governor and Presiding Officer Of the Texas Senate,	)	CIVIL ACTION NO. L-03-113
Defendants.	)	

DECLARATION OF EDWARD BRIAN GRAHAM

Pursuant to 28 U.S.C. 1746, I, Edward Brian Graham, declare that:

1. My name is Edward Brian Graham. I have previously submitted a sworn Declaration in this case. I reside at 1311 Berkshire Drive in Austin, Texas.

2. At the request of attorney J. Gerald Hebert, I have reviewed the Affidavit of Ms. Patsy Spaw, Secretary of the Texas Senate, dated August 15, 2003, which I understand has been filed with the court in this case. In the affidavit Ms. Spaw outlines the Senate Rules and procedures involved in bringing bills before the Full Senate for debate through a motion to Suspend the Regular Order of Business and the use of what is termed a "Blocker Bill" in that process.

3. While generally correct, Ms. Spaw's account, in my opinion, fails to clearly indicate that the existence of a blocker bill is not a prerequisite to placing a bill before the Senate by virtue of a motion to suspend Senate rules, where such a motion requires either unanimous consent or the votes of an extraordinary majority of the members of the Senate. Consequently, the Affidavit could, quite unintentionally, lead one to the invalid conclusion that where there is no blocker bill, the Senate consistently uses some other method to bring a bill to the Senate Floor. In fact, my research suggests that is clearly not the case.

4. For background, it is necessary to explain that the 'blocker bill' is a proposed piece of legislation that is rushed through the Senate committee process so that it will be the first measure reported from a Senate committee. Under the Senate's operating procedures and Rules, this places the blocker bill at the head of the official Senate Calendar, which is a list of bills reported from Senate committees in the order in which they were reported from those panels. What makes the blocker bill important is that its author never intends that it will be taken up by the Senate.

5. If the Senate were to operate under the "Regular Order of Business:" it would be required to debate and vote on the bills listed in the Calendar in that order. The result could be that major legislation, which takes longer to be considered and adopted by the committees, would appear far down the list and there might not be time for it to be considered by the Full Senate before the legislative session ends.

6. To avoid that possibility, the Senate uses the method of adopting a motion to suspend the Regular Order of Business rule and take up a bill out of its normal order. The adoption of this motion requires either the unanimous consent of all the Senators present or, in lieu of that, the affirmative vote of two-thirds of the members present (or 21 votes if all 31 Senators are present) even though only a majority vote (16 if all are present) is actually required to enact the bill after a supermajority of senators has agreed to take it up out of order.

7. This practice or procedure of filing a blocker bill and requiring that a supermajority (2/3) of senators vote to take up a bill out of order has been a consistent practice in the Texas Senate for decades. Around the Senate, senators often refer to this process as "the 2/3 Rule".

8. The primary purpose (and benefit) of the use of this suspension method is that it often forces the Senate to reach a compromise on controversial and significant legislation in order to obtain the 21 votes necessary to suspend the rules. (See the attached excerpt from my privately published manual, The Texas Legislature: A Guide to the Legislative Maze, for a fuller explanation of the blocker bill system.)

9. It is not clear exactly when the blocker bill system was adopted, however, Ms. Spaw has stated that the Senate has regularly used some sort of a motion to suspend the rules (and therefore requiring a supermajority vote)

to bring up a bill for 100 years, with the use of a blocker bill as a part of that method since about 1949.[1]

10. A blocker bill is not absolutely necessary, however. In fact, it is often not used in Special Sessions. However, by Senate tradition, even without a blocker bill, it has been the practice of the Texas Senate to use some form of the suspension method when dealing with controversial and significant legislation. Nor is the use of a blocker bill an official part of the Senate Rules, but over the years it has become an integral part of the legislative process and is well known and highly regarded practice of the Texas Senate.

11. A motion to suspend the rules is not the only method the Senate may use in order to place a bill before the Full Senate for debate. The most commonly used other method is for the presiding officer of the Senate to lay a bill before the Senate without the necessity of any Senator making a motion or any vote on the question. (When this happens the *Senate Journal* will usually indicate it by stating "The President laid before the Senate..." The *Journal* then usually goes on to state whether it is for second or third reading, and shows the caption of the specific bill.)

12. This other method has occasionally been used by presiding officers to bring a controversial measure before the Senate when it has proven impossible to obtain the approval of two-thirds of the senators. However, that is a rare deviation from the established Senate practice or procedure, and it is

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[1]See Letter of July 15, 2003, from Ms. Patsy Spaw, Secretary of the Texas Senate, to Senator Leticia Van de Putte (D-San Antonio).

considered a highly controversial act as well. An attempt to do so is, in fact, at the heart of the current controversy that has blocked the Senate from meeting during the current Second Called Session of the 78th Legislature. An announced plan by then Lt. Governor Hobby to do the same was also the spur for the "Killer Bees" episode in 1979 when a group of Democratic senators broke the Senate's quorum to block passage of a presidential primary proposal.

13. Because the two-thirds rule is usually considered sufficient protection for minority interests, organized efforts to block Senate action by denying it a quorum of members required to meet are rare. It is also quite difficult to arrange for at least 11 senators to be absent at the same time. Prior to the current case, the last such quorum break was in 1993 when the Republican members of the Senate spent a day hidden in a Capitol building office to block action on a bill they opposed.

14. The principal benefit of using this system on controversial measures is that the procedure bypasses the need to compromise on the legislation. It can also be implemented by the lieutenant governor, in his role as president of the Senate, without any motion or vote by the members of the Senate. In addition, since there is no appeal from his action, this leaves Senators who object to deviating from the Senate's normal no alternatives other than to vote on the bill or to 'break the quorum" by leaving the Senate.

15. The "lay a bill before" system is, however, frequently used by the Senate to allow it to more rapidly pass purely local bills (which affect only one

governmental entity) or uncontroversial measures through what is known as the "Local & Uncontested Calendar System". This system places bills before the Senate without a motion to suspend any other rules, but is specifically limited to non-controversial and local bills. That fact is enforced by Senate Rules which provide: (a) that the bill must be recommended for passage on the Local & Uncontested Calendar by the Senate Committee which considered it; (b) that, in turn, it must be approved by a vote of the separate Senate Committee on Administration; and (c) that a complete list of the bills to be included on the Calendar be provided to all senators at least 24 hours before the bills are to be debated.. These requirements are then backed up by a provision that allows any two members of the Senate to remove a bill from the Local & Uncontested Calendar by simply filing a written notice of objection to the measure. Suspending any of these requirements is virtually impossible, since the Senate rules provide that it requires the unanimous consent of all the members present to do so. (Senate Rules 9.01 through 9.07.)

16. In my opinion, the major failure of Ms. Spaw's Affidavit is that it fails to make clear that the absence of a blocker bill does not mean that the Senate automatically uses the "lay a bill before" method to place bills before the Full Senate. Her failure to make this clear may be interpreted to suggest that the Legislature used that method to pass the majority, if not all, the bills considered by the Senate in the six (6) Special Sessions cited by Ms. Spaw. For example, Ms. Spaw's affidavit (p.2) states that:

> "Historically, according to the *Senate Journal* there were many times that the Senate did not recognize a 'blocker bill' and therefore did not suspend the regular order of business by a two-thirds vote when considering bills that were at the top of the regular order. Instances where the Senate followed this practice occurred in the Third Called Session of the 72nd Legislature, the First Called Session of the 65th Legislature, the First Called Session of the 63rd Legislature, the First Called Session of the 59th Legislature, the Second Called Session of the 57th Legislature, and the Second Called Session of the 55th Legislature.

17. This statement by Ms. Spaw may be technically correct to the extent that a 'blocker bill' was not being used on these occasions. However, it gives the invalid impression that the Senate did not use a method requiring an extraordinary majority vote in order to consider bills during those sessions when, in fact, it did. It is also noteworthy that Ms. Spaw cited as examples only six (6) of the thirty-five (35) special sessions called during the same period of years covered by her examples.[2]

18. In fact, my review of the official bill histories contained in the Senate Journals for the six Special Sessions cited by Ms. Spaw clearly demonstrates that, even without the use of a blocker bill, most of the legislation considered during those particular Special Sessions reached the Senate Floor as a result of a motion to suspend one or more of the Senate's rules, where either unanimous consent or an extraordinary majority vote was required.

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[2] Texas Legislative Reference Library, printout entitled "Texas Legislative Sessions and Years", August 20, 2003.

19. A Session by Session review of the particular Special Sessions cited by Ms. Spaw is attached to this memorandum. However, a brief analysis of that review shows the following:

- An estimated 65 bills were placed before the Senate for its consideration during the six special sessions.
- Of these 65 bills, 53 were brought before the Senate by a motion that required either unanimous consent or the affirmative vote of an extraordinary majority of the members of the Senate.
- Of the remaining 12 bills "Laid before the Senate" without a vote, 10 had clear racial or political, or both, attributes.
- Included in those 10 measures were: Four bills passed by what has been called the "Segregation Forever" Session in 1957 in its attempt to block the desegregation of public schools in Texas; a bill that would have changed the method used to fill vacancies in the U.S. House of Representatives; a voter registration bill to replace the poll tax that required annual registration with the registration period limited to only 30 days per year; and four bills would have implemented agreements with minority plaintiffs for the reapportionment of the Texas House of Representative and Texas Senate to replace plans more favorable to the Republican Party.

20. **My conclusion is as follows: the use of the any method to place a bill before the Senate other than by a motion to suspend the rules (which requires a two-thirds vote of members present under the Senate Rules) is a clear deviation from the normal, established Senate practices and procedures. Moreover, in the few instances cited in the Spaw Affidavit when a procedure has been used to place a bill before the Senate without suspending the senate rules, this has occurred most frequently for bills with some racial or political purposes.**

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Dated: Aug 21, 2003

Edward Brian Graham

Edward Brian Graham

Session by Session Analysis[3]

2nd Called Session, 55th Legislature, 1957

All page citations are from the official *Senate Journal* for the 2nd Called Session of the 55th Legislature.

According to the official bill history recorded in the Journal, 37 ***bills reached the Senate Floor for debate during the Special Session. Thirty-two (32) of the bills reached the Floor by virtue of a motion to Suspend Rules*** which, by its nature, required either unanimous consent or the vote of an extraordinary majority of at least two-thirds of the members of the Senate, present and voting.

Only five (5) were "Laid before the Senate" for consideration by the Senate President without the need for such a motion. Four (4) of those five (5) ***were part of the so-called "Segregation Forever" anti-school integration legislation*** for which the governor had called the Special Session. The fifth was a totally local bill affecting only the Austin Independent School District.

Bills that reached the Floor by being "Laid before the Senate" without the need of an extraordinary majority vote:

1. SB 1: Part of the "Segregation Forever" Package. Provided for closing of public schools after "military occupation" to enforce desegregation (after the situation in Little Rock, Arkansas). "Laid before the Senate" by the President, p. 52.
2. SB 2: Another part of the "Segregation Forever" Package. Provided that the Texas Attorney General may provide legal assistance to local school districts fighting desegregation orders. Motion to Suspend the Regular Order of Business made, but bill blocked from reaching the Floor by a point of order that the necessary printed copies were not available, p. 41; "Laid before" on Second Reading, p 52; passed by voice vote, Gonzalez registering Nay, p. 52;
3. SB 15: Another part of the "Segregation Forever" Package. Required registration of and disclosure of members of any organization "engaged in activities designed to hinder, harass, and interfere with the powers and duties of the State of Texas to control and operate its public schools." "Laid before" on Second Reading, p. 89; "Laid before" on Third Reading, p. 96.
4. HB 5: Another part of the "Segregation Forever" Package. House version of the registration and membership disclosure bill; "Laid before" on Second Reading, p. 126; "Laid before" on Third Reading, p. 128.
5. HB 14: Transfer of land to Austin ISD, "Laid before in lieu of" Senate companion, p. 75. A purely "local bill".

Bills brought before the Senate by a Suspension of the Regular Order of Business or some other motion requiring an extraordinary majority:

1. SB 3: Road District No. 1 of Dallas County; Rules Suspended, p. 28
2. SB 5: Relating to operations of the Veterans Land Board, RULES Suspended, p. 65
3. SB 6: Wilbarger Creek Water Control & Improvement District (WCID) No. 1 in Travis County, Rules Suspended, p. 73.
4. SB 7:Brushy Creek WCID, Rules Suspended, p. 63
5. SB 8: San Gabriel River Water CID, Rules Suspended, p. 65.
6. SB 9: North Live Oak Conservation & Reclamation District, Rules Suspended, p. 31.
7. SB 11: Validating procedures of the Tri-County Municipal Water District, Rules Suspended, p. 68.
8. SB 12: Shorthand reporters for the 10th, 56th and 122nd Judicial District Courts, Rules Suspended, p. 32.
9. SB 13: Using dogs in deer hunting in Shelby County, Rules Suspended, p. 32.
10. SB 14: Upper Neches River Municipal Water District, Rules Suspended, p. 61.

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[3] The information in this review was taken from the detailed bill history sections of the *Senate Journal* for the appropriate Special Session. For major legislation, the exact pages of the Journal were then checked to confirm the information shown in the bill history. Spot checks were made for less significant legislation.

11. SB 16: Wildlife laws in Kerr and Gillespie counties; Rules Suspended, p. 60.
12. SB 17: Rockwall County WCID, Rules Suspended, p. 62.
13. SB 19: Transfer of easement by Texas Youth Council to City of Corsicana, Rules Suspended, p. 76.
14. SB 20: Appointment of clerks and clerks pro tem for courts of appeals, Rules Suspended, p. 83.
15. SB 21: Allow WCIDs to lease land and facilities, Rules Suspended, p. 59.
16. SB 22: Term of bonds for schoolhouses built of wood, Rules Suspended, p. 62.
17. SB 24: Transfer of library funds, Rules Suspended, p. 101.
18. SB 26: Quail season in Andrews County, Rules Suspended, p. 75.
19. SB 27: Appropriation to State Board of Insurance, Rules Suspended, p. 107.
20. SB 28:Employee to provide legal work for the Texas Employment Commission, Rules Suspended, p. 101.
21. SB 29: Minnow law for Childress County, Rules Suspended, p. 129.
22. HB 4: Hunting and fishing laws in Jasper County, Rules Suspended, p. 84.
23. HB 6: Per Diem funds for legislators, Rules Suspended by unanimous consent, p. 130.
24. HB 7" Budget powers in counties of up to 600,000 population, Rules Suspended, p. 66.
25. HB 11: Domestic Relations Court in Smith County, Rules Suspended, p. 66.
26. HB 12: Quail season in Paris County, Rules Suspended, p. 95.
27. HB 16: Shorthand reporter for the 84th Judicial District Court, Rules Suspended, p. 99.
28. HB 18: Appropriations to the State Dept. of Agriculture, Rules Suspended, p. 99.
29. HB 25: Land transfer to City of Cisco, Rules Suspended, p. 97.
30. HB 26: Reallocating appropriation to the Veterans Affairs Commission, Rules Suspended, p. 103.
31. HB 31: Land exchange in Cherokee County, Rules Suspended, p. 96.
32. HB 33: Confederate veterans' pensions, Rules Suspended, p. 100.

2nd Called Session, 57th Legislature, 1961

All page citations are from the official *Senate Journal* for the 2nd Called Session of the 57th Legislature.

According to the official bill histories in the *Senate Journal*, only three (3) bills reached the Senate Floor for debate during this Special Session. Two were placed before the Senate by a motion requiring either unanimous consent or an extraordinary majority vote. The third, SB 2, was laid before the Senate by the President without such a motion. . ***Just as in the case of the 55th Legislature, this bill, SB 2 had racial and political considerations*** as it called for changing the law governing Special Elections for the U.S. House of Representatives.

Bills that reached the Floor by being "laid before the Senate" without the need of an extraordinary majority vote:

1. SB 2: Relating to procedures for a special election to fill a vacancy in the U.S. House of Representatives "Laid before the Senate" by the president, p. 29; Second Reading passage by a voice vote, p. 30, Motion Suspend the Three-Day Rule lost by a vote of 15 Yeas, 12 Nays (not receiving the necessary four-fifths vote); "Laid before" on the next legislative day, p. d32; Passed on Third Reading by a vote of 14 Yeas, 13 Nays; pp. 32-33.

Bills brought before the Senate by a Suspension of the Regular Order of Business or some other motion requiring an extraordinary majority:

1. SB 1. Teachers' Salaries. Rules Suspended by a vote of 30 Yeas, 0 Nays, p. 14; Second Reading passage by a voice vote, p. 24; Suspension of the Three-Day Rule by a voice vote; Passage on Third Reading by a vote of 30 Yeas, 0 Nays, p. 24.
2. HB 2: Appropriation to the Teacher Retirement System. Rules Suspended, p. 27.

1st Called Session, 59th Legislature, 1966

All page citations are taken from the official Senate Journal of the 1st Called Session of the 59th Legislature.

The 1st Called Session of the 59th Legislature is ***another example of the use of the "Laid before" system instead of by a suspension of the rules to bring a bill that had clear racial and political attributes before the Senate.***

In this case, the bill was SB 1, which tentatively established a new voter registration system, as the bill caption put it, "based on premise that poll tax will be abolished as a prerequisite for voting." The fact that the new system would require annual voter registration with the registration period limited solely to the month of January made the bill particularly objectionable to racial minority and political liberal groups. (SB 1, "Laid before", p. 35; Passed on Second Reading, p 79 (after a vote to table a more liberal substitute of 15 Yeas to 14 Nays); Passed on Third Reading, p. 80.

The only other bill to reach the Senate Floor during the session was HB 12, which covered the cost of the special session. Unlike SB 1, it was placed before the Senate by a motion to suspend the rules by a vote of 29 Yeas, 0 Nays, p. 102.

1st Called Session, 63rd Legislature, 1973

All page citations are from the official *Senate Journal* for the 1st Called Session of the 63rd Legislature.

Bills that reached the Floor by being "laid before the Senate" without the need of an extraordinary majority vote:

None. The Spaw Affidavit is in error when it indicates that legislation reached the Senate Floor during this Special Session without there having been a motion to Suspend the Rules. It is correct in that there was no official "Blocker Bill" during the Session, but in error when it says that a bill reached the Senate Floor without such a motion.

According to the official bill history in the Journal of this Special Session, only one (1) bill, SB 1, reached the Senate Floor during this extra-short Special Session called for the limited purpose of lowering the Texas highway speed limits. That bill was brought before the Senate by a motion made by then Sen. Nelson Wolff (D-San Antonio) that read as follows:

> "Senator Wolff moved that Senate Rules 12, 68 and 74 and the Constitutional Rule requiring bills to be read on three several days be suspended and that S.B. 1 be placed on is second reading and passage to engrossment and on its third reading and final passage.
>
> "The motion prevailed by the following vote: Yeas 24, Nays 6."

Senate Journal, p. 17.

1st Called Session, 65th Legislature, 1977

All page citations are taken from the official *Senate Journal* for the 1st Called Session of the 65th Legislature.

The records of this Special Session show that a ***total of 17 bills were brought before the Senate with 16 being brought up by a motion to suspend the rules and only one placed there by being "Laid before the Senate"*** by the presiding officer.

The one measure "Laid before the Senate" was SJR 2, a proposed amendment to the Texas Constitution that would have allowed agricultural land to be taxed on the basis of its "productivity value" rather than on the basis of its "market value", as used on all other kinds of real property. Of special note is the fact that this version of the amendment later died in the Texas House and was replaced by a House version that extended tax cuts to residential property owners as well as to agricultural interests. The controversial nature of SJR 2 is perhaps best illustrated by the fact that the votes on at least two motions to table amendments were 14 Yeas, 16 Nays and 14 Yeas, 14 Nays, respectively.

SJR 2: "Laid before", p. 70; Passed on Second Reading by a vote of 24 Yeas, 5 Nays, 1 Present-not-voting, p. 72; Suspension of the Three-Day Rule by a vote of 29 Yeas, 1 Nay, p. 72; Passage on Third Reading by a vote of 24 Yeas, 5 Nays, 1 Present-not-voting; p. 72.

The 16 other measures passed by the Senate after a motion to suspend the rules in order to consider them were:

1. SB 1: Exemptions from the inheritance tax and repealing the sales tax on residential electricity and gas. Rules suspended by a vote of 29 Yeas, 0 Nays, p. 22.
2. SB 2: Exemptions for the state inheritance tax. Rules suspended p. 23.
3. SB 4: Implementing the valuation system for agricultural land. Rules suspended p. 73.
4. SB 8: Validating certain municipal boundaries. Rules suspended p. 98.
5. SB 10: Contributions by state agencies to social security. Rules suspended p. 96.
6. SB 13: Transfer of the Gatesville State School for Boys property to the Texas Dept. of Corrections. Rules suspended p. 99.
7. SB 17: Appropriations for the cost of publishing notice of the proposed constitutional amendments Rules suspended p. 137.
8. SB 19: Amending the laws for county school administration. Rules suspended p. 174.
9. SB 20: Student fees at West Texas State University. Motion to suspend the Rules blocked by a point of order, pp. 171-172; second motion to suspend the regular order of business, p. 179.
10. SJR 14: Another version of the proposed constitutional amendment, this time adding residential and senior citizens. Rules suspended 117.
11. SJR 17: A proposed constitutional amendment to authorize municipal tax increment financing bonds. Rules suspended pg. 187.
12. HB 1: Implementing the proposed tax exemptions. Rules suspended p. 74.
13. HB 8: Limiting local property tax increases. Rules suspended p. 195.
14. HB 36: Salary and compensation for the court reporter for the 31st Judicial District Court. Rules suspended p. 180.
15. HB 57: Creating a special fund to reimburse local school districts for their lost property tax revenues. Rules suspended pp. 200-201.
16. HJR 1: Constitutional amendment for agricultural property taxation including residential and senior citizen tax cuts. Rules suspended "by unanimous consent", p. 172.

3rd Called Session, 72nd Legislature, 1992

All page citations are taken from the official *Senate Journal* of the 3rd Called Session of the 72nd Legislature.

The official bill histories in the Senate Journal for this session show that ***only five (5) bills were placed before the Senate for consideration. Four (4) of those bills were "Laid before the Senate" without any motion to suspend any rules.*** Two of the four, SB 1 and HB 1, reapportioned the Texas House of Representatives and Texas Senate Districts. The redistricting bills were attempts to enact court settlements that replaced earlier acts by the Legislature that had been invalidated. The remaining pair would have moved the date of the 1992 party primary elections if necessary to taken into account the time necessary for judicial or U.S. Department of Justice approval of the redistricting bills. All four were considered by the Senate sitting as a Committee of the Whole prior to Senate Floor action.[4]

[4] The redistricting bills dealt only with districts for the Texas House and Senate, not with the kind of U.S. House of Representatives districts involved in the current controversy. An earlier review of the legislation to reapportion U.S. House seats considered by the Texas Legislature during the past 100 years demonstrated that virtually all such bills were brought before the Senate by some sort of motion requiring either unanimous consent or a extraordinary majority vote. The only exceptions were in 1981 when a congressional redistricting bill was placed before the Senate by a motion requiring only a majority vote. However, that deviation from what otherwise appeared to be the existing policy was itself approved by the vote on an extraordinary majority of the Senate. See Exhibit A to Declaration of Brian Graham,

The fifth bill was a purely local bill, SB 3 (affecting the terms of the directors of the Midland County Hospital District). It was placed before the Senate on a motion to suspend all necessary rules, which was adopted by unanimous consent (Journal p. 110).

The decision to lay the redistricting and election date bills before the Senate without a vote was made by the then Lieutenant Governor Bob Bullock. He announced to the media that he was doing so because it would not be possible to obtain the necessary two-thirds vote to suspend the Regular Order of Business. ***No Senate vote was taken on this procedure and Bullock overruled a point of order against considering SB 1.***

SB 1: Senate districts. "Laid before the Senate", p. 12; Passed on Second Reading by a vote of 18 Yeas, 12 Nays (Nays were 9 Republicans and Democrats Sims, Lucio and Tejeda. Sims was receiving an unfavorable district. Luico was supporting him. Tejeda filed a statement in the Journal that he voted against the bill because of the way it split African-American areas of Bexar County, although he said he much preferred it to the plan imposed by a federal court), p. 97; Laid before on Third Reading, p. 107; Passed on Third Reading by a vote of 18 Yeas, 12 Nays, pg. 107.

SB 2: Change primary election date. "Laid before the Senate", p. 98; Passed on 2nd Reading by a vote of 19 Yeas, 11 Nays; pp. 99-100; Laid before the Senate on Third Reading, p. 109. Died in the House.

HB 1: House of Representative Districts. "Laid before the Senate", p. 109, Passed on Second Reading by a vote of 19 Yeas, 11 Nays, pg. 109; "Laid before the Senate:" on Third Reading, p. 115.

HB 2: Change primary election date. "Laid before the Senate", pg. 110; Passed on Second Reading by a vote of 18 Yeas, 12 Nays, p. 110; "Laid before the Senate" on Third Reading, pg. 117: Passed on Third Reading by a vote of 18 Yeas, 11 Nays, pg. 117.

Another example

In addition to these six Special Sessions used as special examples, Ms. Spaw also cited the passage of a bill by the 1st Called Session of the 60th Legislature in 1968.

Just as in the other six cases, the *Senate Journal* shows a mixed pattern of how legislation was considered. Two major, controversial measures—a tax bill and a liquor regulation measure—as well as several local bills being placed before the Senate by the President without the making of a motion to suspend the rules. However, other major bills, including the General Appropriations Act, the most important of all bills, were placed before the Senate by the rules suspension method. ***The fact that an earlier attempt to Suspend the Rules to consider the tax bill had failed suggests that the decision to "lay it before the Senate" be made only when the normal procedure proved unworkable.***

Bills that reached the Floor by being "laid before the Senate" without the need of an extraordinary majority vote:

One major bill, HB 2, a highly controversial tax increase measure, was "Laid before the Senate" without a motion to suspend any of the rules after an attempt to Suspend the Rules failed by a vote of 14 Yeas, 10 Nays (not having obtained the necessary two-thirds majority), pp. 83 and 92. After a lengthy debate, the bill failed to pass on Second Reading by a vote of 13 Yeas, 18 Nays, p. 155; that vote was later reconsidered and the bill was again "Laid before" and passed, p. 221.

Another controversial bill, HB 1, relating to liquor sales, was also brought before the Senate by this method, p. 222.

And, an attempt was made to place another bill, SB 1, before the Senate by this same method but that attempt was blocked by a point of order, p. .83.

In addition, a purely local bill (affecting only school districts with a population of 11,175 to 11,250) was also passed by this method, p. 273.

Ten (10) other minor bills were also "Laid before the Senate" without a motion but each was immediately removed from the Floor by a valid point of order that the bills were "not included in the Governor's Call for the session." (SB 8, SB 10, p. 254; SB 13, SB 20, p. 272; SB 14, SB 15, p. 255; SB 21, p. 255; SB 27, p. 272; and SB 23 and SB 24, pg. 273.) The fact that all these bills were removed from the Floor by a point of order suggests that the "Laid before" method was used simply to dispose of them in the shortest possible time.

Bills brought before the Senate by a Suspension of the Regular Order of Business or some other motion requiring an extraordinary majority:

Six bills, including SB 4: the general appropriations act, were placed before the Senate by a virtue of a motion to suspend the rules; SB 4, p. 60; HB 5, p. 65; HB 11, pg. 11, HB 16, Suspension motion lost, p. 275, Rules Suspended, p. 278; HB 23, p. 281; and HB 25, pg. 274

ATTACHMENT: An excerpt from The Texas Legislature: A Guide to the Legislative Maze, 6th Edition, (November 1999)

The Senate System

The Senate also has a calendars committee but uses it only for local and uncontested bills through a special process known as the Senate Local & Uncontested Calendar. (Actually, the Senate Administration Committee which also takes care of the Senate's housekeeping matters.)

Other bills--including all the major legislation--are usually brought before the Senate through a system known as 'suspending the regular order of business'.

Under the 'suspending the regular order of business' system bills emerging from Senate committees are placed on a list in the order in which they were reported from the committees. This list is called the 'Senate Calendar.'

If the Senate followed 'the regular order of business,' it would consider the bills in the order they appear on the calendar and would not be able to consider a bill listed somewhere down the calendar until it had completed action on all those that precede it on the list. However, it doesn't. Instead, a 'tradition' has been developed under which bills are 'brought up out of the regular order' by a suspension motion.

This system is designed to ensure that, before a bill comes to the Floor, it has the support of an overwhelming percentage of the senators. It also gives the Senate a way to move important bills directly to the Floor, bypassing the many less significant measures that may precede it on the calendar.

To make this system work, the Senate traditionally places or 'parks' a bill at the very top of the calendar that it never intends to pass. This bill--known as the 'blocker'--serves as a block to all other legislation unless the 'regular order of business' is suspended. (A House Bill--usually one whose Senate companion has already passed the Senate--is also 'parked' on the calendar as the first House bill to make the same system work on House Bill Days when House bills move to the top of the calendar.) No effort is made to debate and pass the bill so none of the bills behind it on the calendar can be considered unless such a motion is made.

On minor bills, this motion can be approved 'by unanimous consent' without the necessity of taking a vote. However, if even one senator 'objects,' the Senate requires a formal vote on the motion to allow debate on the measure.

This motion requires the support of two-thirds of all the senators present and voting at the time. This means that if all 31 senators are present, it will require 21 votes in favor of the motion to bring up the bill. If 30 are present, it will take 20, and so forth. (During the first 60 days of the session, the Senate requires a four-fifths vote, or 25 'yes' votes when all 31 senators are present, to bring a bill up.)

What makes the Senate's procedure unusual is that, once a normal bill or resolution has been moved off the calendar for debate, only a majority vote is required for it to pass the Senate. However, while it only takes 16 votes to pass a bill--if all 31 senators are voting--it takes five more votes just to discuss it. This means that even if a majority of the senators favor a bill, a minority

can defeat it by voting not to suspend the rules. (Constitutional amendments require both a two-thirds vote to be debated and a two-thirds vote to be passed.)

The 'blocker' system is a Senate 'tradition' and not required by the Rules, but, like most Senate traditions, it has strong support. Lt. Governor Hobby honored during most of his term in office. His most famous deviation occurred in 1979 when his action resulted in the 'Killer Bee affair' in which a group of senators broke the Senate quorum by hiding out for several days to block the passage of a bill favored by Hobby. (See QUORUMS & VOTING.)

The lieutenant governor plays an important role in determining which bills will reach the Senate Floor since a suspension motion can only be made if he agrees to allow it. This means that Senate members must find a way to convince the lieutenant governor to let them bring their bills up.

Lt. Governor Hobby used the power to block a suspension vote sparingly. He generally recognized any senator who had complied with the Senate Intent Calendar Rule and who demonstrated that he had enough votes lined up to approve the suspension motion. Lt. Governor Bullock followed Hobby's lead in this area.

Getting the required votes to suspend the rules and take up a bill often requires a senator to make deals with other members of the Senate. He may, for example, be required to trade votes with other senators and agree to vote to suspend the rules for one of their bills if they agree to vote for his, or he may have to agree to accept some change they want to make to his bill.

Because these negotiations are conducted off the Senate Floor--often in the members' lounge that is closed to the public--when the Senate actually votes on a bill it usually moves very fast. The deals have been cut, the votes are lined up and the bill is passed in only a few minutes. As such, the Senate is often less exciting to watch than the House, where lengthy debates are common.

The Senate requires that the rules be suspended each time the bill comes up. This means the same process of suspending the rules must be used for the Second and Third Readings of the bill. It is, therefore, possible for a bill to pass the Senate on Second Reading, but fail to pass on Third because a senator who voted to suspend the rules the first time refuses to do so again. However--just as in the House--it is rare for a bill that reaches the Floor to be defeated.